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IS A LARGE[1] CORPORATION AN ILLEGAL COMBINATION OR MONOPOLY UNDER THE SHERMAN ANTI-TRUST ACT?

At common law, neither a large corporation nor a large partnership is an illegal combination. In no proper legal sense is a large, dominating corporation a combination at all,[2] but whether or not it is a combination, it is certainly not an illegal one. For, as we shall presently show, the common law does not condemn size as such, or set any limits to the amount of business or property of an individual or corporation, and neither a partnership nor a corporation was ever thought of as involving a restraint of trade.

Nor is a large, dominating corporation in any strict sense, legal or etymological, a monopoly. This word, according to the original common law conception, and the commonly accepted definition based upon it, involves the idea of a sole or exclusive right or privilege.[3] The conception that a corporation, although possessed of no such sole or exclusive right, is a monopoly, provided it can dominate its particular trade, is modern. And the notion that a large, dominating corporation may, under the old principle of the common law as to unreasonable restraints of trade, be suppressed or enjoined from doing business as an illegal combination or monopoly, is still more modern. It finds some support in recent political discussions and judicial dicta, but very little support in the

[1] "Large" corporation is here used in the sense of a corporation deemed to be large and strong enough to dominate its particular trade.

[2] Locker *v.* American Tobacco Co. (N. Y. 1907) 121 App. Div. 443.

[3] 4 Bl. Com., Ch. XII., 9; Stickney's State Control of Trade & Commerce, pp. 94-5; Bills & Debates in Congress relating to Trusts, Fiftieth to Fifty-seventh Congress, p. 324. Senator Edmunds, Chairman of the Judiciary Committee, to which the Anti-Trust Act was referred, quoted with approval Webster's definition, which includes the idea of a *sole* and *exclusive* right and control. *In re* Greene (1892) 52 Fed. 104, at 115-6.

actual decisions, and, what is important for the purposes of this article, no support whatever in the decisions of any of our highest courts prior to the passage of the Sherman Anti-Trust Act.[4] It is wholly indefensible in principle, and involves two fundamental errors.

The first error consists in the failure to recognize that there is no principle of the common law which condemns mere growth and size or financial power, or, what amounts to the same thing, imposes a limitation with respect to the amount of property which may be owned or the amount of business which may be done either by an individual or a corporation. Under our political system, it is obvious that the limitation of the size of a corporation is a legislative and not a judicial function. It is for the legislative branch of the government to determine how much property may be owned or business may be done by either an individual or a corporation, and if the legislative branch has prescribed no limitations, the courts, whose function is limited to interpreting the laws, can impose none. Even if, in the last Presidential election, the people of this country by an overwhelming majority had adopted Mr. Bryan's platform, and, in particular, his plank with respect to the 50% limitation, it would not have been competent for the courts to declare that a corporation, whenever it exceeded that limit, was an illegal monopoly. For the adoption of the platform would not have made such a limitation the law of the land, and until it did become the law of the land, made so by proper legislative action, the courts could not grant any relief as if it were the law of the land.

If, then, there is no principle of the common law imposing any limitation upon the amount of property which may be owned or business which may be done by a corporation, there can be no illegality under the common law in the mere acquisition of a very large amount of property, or the doing of a very large amount of business. If there is no illegality in the acquisition of property or the doing of business, however large, it follows that the courts cannot, under the common law, adjudge a corporation, any more than an individual, guilty of an illegal act, if it acquires so much property, or does so much business, that it can exert a dominant or controlling influence in its trade. If the acquisition and ownership of property, however large, does not constitute an offence against the common law, then the mere acquisition and ownership of property, even assuming that it involves the power of doing an illegal act,

[4] IV. COLUMBIA LAW REVIEW 329, notes 2, 3, 4.

cannot of itself constitute an offence against the common law. Because property which may be lawfully used may also be used to the detriment of others and for the purpose of committing an illegal act, is obviously no ground for declaring that the mere acquisition and ownership of it constitutes an illegal act, and that the owner of it may be restrained from exercising all rights of ownership. Even if a mill may be so operated as to emit noxious gases, that does not justify any court in restraining the owner from using the mill for any purposes. Before the court can grant its restraining order, there must be proof not only that the owner of the mill has the power of doing harm, but that he has actually done or at least threatens to do it.

The second fundamental error, involved in this conception as to the illegality of a large corporation, consists in the failure to discriminate between *contract* rights and *property* rights. Contracts which are deemed to be opposed to public policy are regarded by the courts as invalid and non-enforcible as between the parties to them; that is, when a party to one of these contracts comes before the court, asking for the aid of the court to enforce the rights which he claims under these contracts, the court may refuse to act. As contracts involving unreasonable restraints of trade, according to the old rule of the common law, and, in more recent times, contracts involving the restriction of competition, are deemed to be opposed to public policy, the courts, under the common law, can refuse to lend their aid for the enforcement of such contracts. But it was never supposed that the courts, if the contracts are simply illegal under some rule or policy of the common law, could divest or disturb titles or rights acquired as the result of the performance of such contracts. No proposition is more clearly settled than that, in the absence of a specific statutory provision to the contrary, an indefeasible title to property passes under such contracts, and the owner of property so acquired can exercise the full rights of ownership therein.[5] It is also clearly settled that *ultra vires* acquisitions of property by corporations, *i. e.*, acquisitions of property which they are not authorized by their charters to hold, pass the title and all rights of ownership to the corporations, and the only consequence of such *ultra vires* acquisitions is that the corporation may be dissolved by the State

[5]Strait *v.* National Harrow Co. (1892) 51 Fed. 819; Connolly *v.* Union Sewer Pipe Co. (1902) 184 U. S. 540; Att'y Gen'l *v.* American Tobacco Co. (1897) 55 N. J. Eq. 352.

which granted its charter.[6] In *Connolly* v. *Union Sewer Pipe Company*[7] it was held that the illegality of a combination, to which a corporation was a party, did not prevent the corporation from passing a good title by a sale of its property, and did not justify the buyer in refusing to pay therefor—in other words, selling its property in the regular course of business, and exercising the rights of ownership, is not illegal. In *Strait* v. *National Harrow Company*,[8] it was held that a corporation, party to an illegal combination, could not be restrained from prosecuting an action for infringement of its patents. The *Connolly* case[7] refers with approval to the *Strait* case,[8] quoting from the opinion the following:[9]

"Such a combination may be an odious and a wicked one, but "the proposition that the plaintiff, while infringing the rights "vested in the defendant, * * * is entitled to stop the defendant "from bringing or prosecuting any suit therefor because the de- "fendant is an obnoxious corporation, and is seeking to perpetuate "the monopoly which is conferred upon it by its title to the letters "patent, is a novel one, and entirely unwarranted."

It follows from this that, while the power of dominating a trade and destroying competition, in so far as it rests on *contract,* may be practically destroyed by the courts, since the courts under the common law may refuse to enforce these contracts, the power of dominating a trade and destroying competition, in so far as it rests on *ownership* or *property rights,* is beyond the reach of the courts, since the courts under the common law, in the absence of any statute, have no power to restrain the use and enjoyment of property rights.

Undoubtedly, the legislative body which creates the corporation may limit the amount of property which it may acquire and hold. It may also, in general, prescribe the conditions upon which the corporation may continue to act as such, and, in the exercise of this general power, the legislative body may prescribe that a corporation shall not, as a corporation, do more than a certain amount of business, or shall not do any business at all, if it becomes a party to an illegal combination or monopoly. The Legislature may also make its own arbitrary definition of monopoly. It may define

[6]National Bank *v.* Matthews (1878) 98 U. S. 621; National Bank *v.* Whitney (1880) 103 U. S. 99; Fritts *v.* Palmer (1889) 132 U. S. 282.

[7](1902) 184 U. S. 540; see, also, Harriman *v.* Northern Securities Company (1905) 197 U. S. 244, where it was held that the title to the stock of the Great Northern and Northern Pacific Companies passed to the Northern Securities Company, which had already been adjudged illegal.

[8](1892) 51 Fed. 819.

[9]At page 546.

monopoly as the business of a corporation doing 50% or more of the business in its line, or, defining monopoly, in a more general way, as the business of a corporation doing such an amount of business as practically to dominate or control its trade, the Legislature may leave it to the courts to say in each instance whether the particular corporation complained of is dominant and controlling. Finally, the Legislature may, in addition to forbidding the acquisition of property or the doing of business beyond a certain amount, specifically provide that no title or rights shall be acquired by the offending corporation, or even that they may be forfeited to the State.

If, however, there is no statutory or written law making illegal the acquisition of property or the doing of business beyond a certain amount, *and* providing that no title or rights shall be acquired by such illegal transaction, the corporation acquiring property or doing business beyond an authorized amount, cannot, under the common law, be enjoined from doing business and exercising its rights of ownership. The answer to the question, then, whether a large, dominating corporation is either an illegal combination or monopoly, and, as such, subject to having its business enjoined, must depend upon whether or not there is in force, applicable to such corporation, such a statute. It must appear that some legislative body, having jurisdiction over the corporation and acting within the limits of its constitutional power, has enacted a statute (a) prescribing such a limitation, and (b) prescribing that no title or rights shall be acquired by acting in violation of such limitation.

It is not my purpose in this article to consider with respect to this question the statutes of any State. My purpose is simply to consider the Sherman Anti-Trust Act of July, 1890. Assuming that the corporation complained of under this Act is legally organized under the laws of the State of its creation, and, therefore, legal, according to both the common law and the statute law of its State (as, for instance, are the American Tobacco Company, the Standard Oil Company and the U. S. Steel Corporation),[10] does it

[10]While the U. S. Steel Corporation may receive absolution from the Executive Department, there is no rational basis for any legal distinction between it and other large industrial enterprises. In fact, so far as the power of dominating its trade is concerned, the U. S. Steel Corporation is more favorably situated than some others, by virtue of its ownership or control of large ore deposits and the railroads connected with them; and this power was strengthened by the acquisition of the Tennessee Coal & Iron Company. On the other hand, in the suit against the American Tobacco Company, the Federal Government failed to prove, according to the opinions of the judges, that this corporation had exercised its dominating power to

become illegal and subject to suppression by the Federal Courts under this Federal Anti-Trust Act, if it engages in interstate commerce? This involves consideration of the question whether Congress, within the limits of its constitutional power, has in this statute prescribed (a) a limitation upon the property or business of a corporation, and (b) that no title or rights can be acquired by any corporation violating this limitation. Did Congress in this Anti-Trust Act, according to any reasonable interpretation of it, intend so to prescribe, and had Congress the power to do so, if it had so intended? Both these questions, it is submitted, must be answered in the negative.

In the summary of the law, printed in the foot note,[11] I have

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the detriment of anybody, producer, consumer or competitor, or that it had restrained trade; on the contrary, it appeared that trade in tobacco had been largely increased. All this shows how difficult it is even for the most expert to make a correct diagnosis in the case of Trusts.

[11]The Sherman Anti-Trust Act (Chapter 647, Laws of 1890; 26 U. S. Statutes at Large, p. 209; 1 Rev. Stat. of the United States, Supplement, 2nd Ed., p. 762) is entitled "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies." It consists of eight sections, which provide in effect as follows:

1. That "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce" (interstate or foreign) "is hereby declared to be illegal"; and every person "who shall make any such contract or engage in any such combination or conspiracy" is guilty of a misdemeanor, punishable by fine or imprisonment or both.

2. That "every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce" (interstate or foreign) is also guilty of a misdemeanor.

3. Repeats the provisions of Section 1, making them applicable to trade in any territory of the United States or the District of Columbia, or between territories, or between territories and the District of Columbia, or between territories or the District of Columbia and the States or foreign nations.

(It is to be noted that there is no section making the provisions of Section 2 as to monopolies applicable to trade in the territories, District of Columbia, &c.")

4. That the United States Government may "institute proceedings in equity to prevent and restrain violations of this Act."

5. Relates to procedure—unimportant for this discussion.

6. That "any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in Section 1 of this Act, and being in the course of transportation (in interstate or foreign commerce), shall be forfeited to the United States."

(It is to be noted that property owned by a monopolizing person, referred to in the second section of the Act, is not forfeited.)

7. That "any person who shall be injured in his business or property by reason of anything forbidden or declared to be unlawful" may recover damages.

8. "That the word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations" existing under the laws of the United States or any State or territory.

quoted all the essential words of the Act. From this summary of the law and its title, the meaning of the Act, read in the light of the principles discussed in the preliminary part of this article, seems sufficiently clear. The Act deals with what are evidently regarded as two distinct things, *first,* unlawful restraints of trade resulting from contracts, &c., which are referred to in the first section, and are both forbidden and declared illegal, and *secondly,* unlawful monopolies, which are referred to in the second section, and are simply forbidden.

Does a large, dominating corporation come within the terms of the first section of the Act? To the writer it seems clear that it does not come either within its letter or spirit. This section provides that "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce," is illegal, and forbids every person from making any such contract or engaging in any such combination or conspiracy.

A corporation lawfully organized under the laws of a State for trade or commerce is certainly not a conspiracy. A corporation, it may be conceded, involves a contract of membership among its stockholders, but such a contract was never regarded as in any sense a contract in restraint of trade. There is absolutely no basis whatever, either in reason or authority, for any such conception. There is much less reason for it in the case of a corporation than in the case of a partnership, in which, in the absence of an agreement to the contrary, the partners are bound to give their whole time and services to the partnership, and not to engage in any competing business. There is no such obligation resting upon stockholders of a corporation.

A corporation, it may also be conceded, may in one sense be regarded as a combination of the persons composing its membership, just as a man, although usually regarded as a unit, may be considered as a combination of his limbs and the other parts of his anatomy. But, in the contemplation not only of lawyers but also of laymen, the corporation is always conceived of as a unity, like an individual, and as a legal person, distinct from its members. In the eighth section of the Act, Congress declares that the word "person," wherever used in the Act, shall include a corporation. That shows that Congress had the correct conception of the unity of a corporation. Moreover, what this section forbids is the act of "engaging in a combination or conspiracy." No one would ever think of describing the act of becoming a stockholder of a corpo-

ration as the act of "engaging in a combination," and it seems preposterous to suppose that Congress could have used those words in any such anomalous sense.

At the time when the Anti-Trust Act was under consideration in Congress, a combination in the form of trust was a well-known device. The Standard Oil Trust had already attracted attention, and one of the corporations, party to the Sugar Trust agreement, had been before the courts of New York. These were instances of true combinations. They were instances not of large corporations, but of combinations of corporations, and these were the combinations which the framers of this Act had in view. Senator Sherman himself in effect stated that the bill was not intended to affect the formation of partnerships or corporations, but simply to deal with "a new form of combination, commonly called trusts, that seeks to avoid competition, by binding the controlling corporations." [12] He further stated that the bill dealt only "with *unlawful combinations, unlawful by the Code of the law of any civilized nation of ancient or modern times.*" [12] As already shown, a large trading corporation, merely because it is large, is not condemned by the common law, either of England or America, nor, so far as the writer is aware, by the law of any other civilized nation. It is not, therefore, condemned by the Sherman Anti-Trust Act.

A more fundamental argument with respect to the meaning of this first section is this: From the terms of the section itself and other provisions of the Act. it is plain that what is condemned in the first section is a restraint of trade resulting from some form of *contract or agreement.* What is condemned is "every contract, combination in the form of trust or otherwise, or conspiracy." A contract or conspiracy is obviously an agreement, and so is a combination in the form of trust. It is a combination resting upon the deed of trust, which is itself an agreement. A combination in the form of "otherwise" must on well settled principles of statutory interpretation, the principle known as that of *ejusdem generis,* be interpreted as meaning a combination of a similar kind, *i. e.,* a combination resting upon agreement.

This argument is strengthened by the other provisions of the section. It not only forbids the entering into the agreement or combination in restraint of trade, making the act of entering into the agreement a criminal act, but it declares that every such agreement

[12] Bills & Debates in Congress relating to Trusts, Fiftieth to Fifty-seventh Congress, p. 94.

[13] *Ibid.* p. 95.

or combination is illegal. While Congress has the power to declare illegal an agreement directly affecting interstate trade, it has no power to declare illegal and to dissolve corporations created by a State. The power of dissolving a corporation or of practically suppressing it by restraining it from exercising or enjoying its rights is vested alone in the State where the corporation was created.[14] Hence in the second section of the Act, as we shall see, Congress simply forbids monopolizing, and does not undertake to declare a monopolizing corporation an illegal combination. In other words, in the case of all forms of *agreement,* Congress both forbids and declares illegal; in the case of corporations as well as persons, with due regard to the constitutional limitations of its power, it simply forbids *illegal acts*—it does not attempt to disturb property rights, or to declare the corporation, any more than a person, illegal. A corporation, like a person, may be guilty of illegal acts, but, in an exact and proper sense, a corporation cannot be called illegal. Illegality is predicable of agreements and acts, not of persons.

But it may be contended that if a large, dominating corporation is not an illegal combination under the first section of the Act, it is at least a monopolizing person under the terms of the second section of the Act.

The second section provides, that "every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce between the States or the State and foreign nations" is guilty of a misdemeanor. During the debates in Congress, the suggestion was made that this section should be amended so as to limit it to the case of a person combining or conspiring with another to monopolize. Senator Edmunds, Chairman of the Judiciary Committee, opposed the amendment, saying that the matter had been carefully considered in Committee; and, after referring to Webster's definition of monopoly, which, as already stated, involves the idea of a sole and exclusive right, he said that one man, if he had capital enough, could monopolize, just as well as two.[15] It may be argued from this, that while Section 1 must be limited to cases of agreements between two or more persons, Section 2 specifically covers the case of a single individual or a single corporation, and,

[14]U. S. Vinegar Co. *v.* Schlegel (1894) 143 N. Y. 537; *In re* Greene (1892) 52 Fed. 104; U. S. *v.* E. C. Knight Co. (1895) 156 U. S. 1; Att'y Gen'l *v.* American Tobacco Co. (1897) 55 N. J. Eq. 352, at 370.

[15]Bills & Debates in Congress &c., p. 324.

therefore, specifically covers the case of a large, dominating corporation. While it may be conceded that this argument is a valid one for excluding the large, dominating corporation from Section 1, it is not sufficient for including it within the scope of Section 2, and for several reasons.

As already pointed out, the Act is entitled, "An Act to Protect Trade and Commerce against *Unlawful* Restraints and Monopolies." It must be assumed that "unlawful" was intended to modify "monopolies" as well as "restraints." Certainly the framers of the bill had no intention, as revealed in the debates, of attempting to make all monopolizing criminal. And to give any such interpretation to the Act would defeat its object.[16] It was specifically pointed out that it was not the intention of the bill to forbid an individual, by his own skill and energy, from pursuing his calling in such a way as to monopolize trade.[17] It was specifically pointed out that something more was needed to bring the monopolizing within the scope of the Act, and as already referred to above, Senator Sherman expressly stated that the bill dealt only with "unlawful combinations, unlawful by the Code of any law of any civilized nation of ancient or modern times."

President-elect Taft, in the important speech delivered by him on August 19th, 1907, at Columbus, Ohio, expressed his concurrence in this interpretation of the Act. Referring to Section 2 of the Act, he said:

"The Supreme Court of the United States has not defined what "a monopoly under this section of the Anti-Trust Law is. I con- "ceive that it is not sufficiently defined by saying that it is the com- "bination of a large part of the plants in the country engaged in "the manufacture of a particular product in one corporation. *There "must be something more than the mere union of capital and plant "before the law is violated.* There must be some use by the com- "pany of the comparatively great size of its capital and plant and "extent of its output, *either to coerce persons to buy of it rather "than of some competitor, or to coerce those who would compete "with it to give up their business.* There must, in other words, be "an element of *duress* in the conduct of its business towards the "customers of the trade and its competitors before mere aggrega- "tion of plant becomes *an unlawful monopoly.*"

If these words had been spoken from the bench of the Supreme Court of the United States by Mr. Justice Taft, they would have constituted the law of the land. But, although not spoken by a

[16] Whitwell *v.* Continental Tobacco Co. (1903) 125 Fed. 454, at 462.
[17] Bills & Debates in Congress &c., pp. 322-323.

justice of the Supreme Court, they were spoken, after mature deliberation, by a man, distinguished as a statesman for honesty of thought and action, and as a judge for sanity of judgment and breadth of view; and they are therefore entitled to very great weight as a sound exposition of the law.

It must be assumed, for the reasons already stated, that Congress well understood the constitutional limits of its power, and knew that it could not wholly suppress either an individual or a corporation engaged in interstate commerce. It must be assumed that Congress understood that its constitutional power did not go further than to enable it to forbid *illegal acts directly affecting* interstate commerce; that it could not suppress or restrain an individual or a corporation, however wealthy and powerful, if he or it was pursuing his or its business by lawful means. This is made clear by other provisions of the Act.

Section 4 provides that proceedings in equity may be instituted to prevent and restrain violations of the Act. Proceedings in equity can be instituted only to prevent and restrain *illegal acts,* but if the acquisition of property or the expansion of the business of the corporation is perfectly lawful in the State of its creation, it must be lawful everywhere.

Section 6 provides that any property owned under any contract or combination mentioned in Section 1 of the Act may be forfeited to the United States. There is no similar provision with regard to property owned by a monopolizing person or corporation mentioned in the second section of the Act. This is clear evidence that Congress well understood that it had no power to divest or disturb the property rights of a monopolizing person or corporation. Congress simply has the power of forbidding any *illegal acts* done by such a monopolizing person or corporation in its interstate business. The mere exercise of the rights of ownership, including the business of buying and selling according to the regular course of trade, is not an illegal act according to the laws of any civilized country. Congress certainly did not intend to forbid any such act; if it had so intended, it would have clearly exceeded its constitutional powers.

Section 7 furnishes cumulative evidence on this point. By that section, a right of action to recover damages is given to any person whose business may have been injured by "anything forbidden or declared to be unlawful." The quoted words mark the broad distinction between the first and second sections. Contracts, com-

binations or conspiracies in restraint of trade are both forbidden and declared to be unlawful. It is within the constitutional power of Congress not only to forbid, but also to declare unlawful, any agreement directly affecting interstate commerce. The act of monopolizing by a single individual or corporation, *i. e.*, without the element of an unlawful combination, is simply forbidden. It is not within the constitutional power of Congress to prevent either a wealthy individual or a wealthy corporation from engaging, or from exercising and enjoying property rights, in interstate commerce. It is undoubtedly within its constitutional power to forbid such an individual or corporation from doing unlawful acts, such acts as were referred to by President-elect Taft in his speech above quoted; namely, acts of duress, coercion, unfair competition or other unlawful practices. It was obviously the intention of Congress in the second section simply to forbid the doing of such acts.

If the foregoing reasoning is correct, a large, dominating corporation, merely as such, is neither an illegal combination within the terms of the first section, nor a monopolizing person within the terms of the second section of the Act. To bring it within the terms of the first section, it must appear that the corporation is party to an agreement restraining trade and *directly affecting* interstate or foreign commerce. To bring it within the terms of the second section, it must appear that it is seeking to monopolize trade by duress or coercion, unfair competitive methods or similar unlawful means. As Judge Taft has said, "there must be something more than the mere union of capital and plant before the law is violated." Even if, however, such a corporation did come clearly and specifically within the terms of either of those sections, the Federal Courts would have no power practically to suppress the corporation by absolutely excluding it from interstate commerce. For it will be perceived that the Act simply forbids certain things and forbids and declares illegal certain other things. It does not either expressly or impliedly provide that no title or rights shall vest by reason of the illegal transactions. It follows, therefore, according to the principles set forth in the introductory part of this article, that the power of the courts in the premises is limited to imposing the punishment provided by the Act, and to refusing its aid for the enforcement of rights claimed under the illegal contracts. The courts have no power to restrain acts of ownership or the exercise of property rights—in other words, they have no

power to disturb the legal situation which exists after the forbidden transactions have been consummated.

The foregoing propositions, although supported by the great weight and current of authority, are, it must be conceded, in conflict with the opinions of the majority of the judges in the case of the American Tobacco Company, recently decided by the Circuit Court of Appeals in this judicial circuit, and in conflict with the opinions rendered by Mr. Justice Harlan, either as one of the majority or as dissenting judge in several decisions of the United States Supreme Court. But these propositions are in accord with all the actual decisions of the United States Supreme Court, not even excepting the decision in the *Northern Securities* case[18] itself. The decision in this case, it may be admitted, is rather difficult to reconcile with the other decisions of the Supreme Court, and especially with the *Knight* case.[19] But the *Knight* case must still be considered the law of the land, for neither in the *Northern Securities* case itself did any of the justices profess to overrule it, nor in any other case have they intimated that they considered it overruled. In the *Northern Securities* case, only one of the justices, Mr. Justice Harlan, expressed an opinion which it is difficult to reconcile with the *Knight* case. Three other justices concurred without opinion, and a fifth justice, Mr. Justice Brewer, while concurring in the result, expressed a qualifying opinion which places the *Northern Securities* case in a class by itself, and sharply distinguishes it from the *Knight* case. Of the remaining four justices, two, Mr. Justice White and Mr. Justice Holmes, rendered vigorous dissenting opinions (in which concurred Mr. Chief Justice Fuller and Mr. Justice Peckham), holding broadly, in accordance with the *Knight* case, that Congress did not have the power, and in the Anti-Trust Act did not undertake to exercise the power, of suppressing big corporations as burdens upon interstate commerce. The distinction between the *Northern Securities* case and the *Knight* case, as pointed out by Mr. Justice Brewer, is this: In the *Northern Securities* case there was a merger of railway companies, which came very near to being true monopolies in the legal sense, and the attempted consolidation was specifically prohibited by the State which created one of the railway companies, and within whose boundary much of the business of both of the railway companies was transacted. And, furthermore, the North-

[18]Northern Securities Company *v.* United States (1904) 193 U. S. 197.
[19]United States *v.* E. C. Knight Co. (1895) 156 U. S. 1.

ern Securities Company had practically no other assets than the stocks of the two railway companies, and was formed for the express purpose of effecting a consolidation which had been previously attempted and had been declared unlawful under the laws of the State. In the *Knight* case there was a merger of companies which were not true monopolies in the legal sense, or so far as they were monopolies, namely, possessed of patents and trade marks, they were perfectly lawful monopolies, and they were companies engaged (as in all cases of industrial corporations) in carrying on business in conformity with the laws and policies of the States which created them. In many instances, also, the large corporation is simply a new form for a consolidation of interests already existing, and surely there can be nothing illegal in the formation of a corporation for the taking over of property and business already consolidated. Again, in most cases, if not in all cases, at the present day, the large industrial corporation is not merely a holding company, as the Northern Securities Company was, but it is the owner of property of all kinds, tangible and intangible, and a part at least of its assets consists of assets acquired and accumulated in the regular course of its business.

In the *Northern Securities* case, Mr. Justice Harlan distinguished the *Knight* case on the ground that "the agreement or arrangement there involved had reference only to the manufacture or production of sugar." But this, it is respectfully submitted, is an entirely erroneous view of the *Knight* case. The agreement or arrangement involved in that case had nothing to do with the manufacture or production of sugar. It had to do with the sales of stock of incorporated companies. These companies, it is true, were engaged in the manufacture and production of sugar, but there is nothing in the opinion of the court to suggest that the decision would have been different, if the incorporated companies had been trading companies, instead of manufacturing companies. It was clearly recognized that all the companies were engaged in interstate and foreign commerce, but this was not deemed sufficient to justify the court in granting the relief asked for by the Government. What the Government sought was that the agreements for the sale of shares of stock, with a view to merging the several sugar refining corporations, should be declared void; that the shares purchased should be delivered up to the vendor corporations, and that the defendant corporations should be restrained from further violations of the Act. This relief was denied upon

the broad ground that the subject-matter involved was the sale of shares of stock, *that the contracts for the sale of shares of stock, although stock of companies engaged in interstate commerce, were not subject to the jurisdiction of Congress, as they affected interstate commerce only indirectly, and that the Act did not authorize Congress to compel the surrender of property which had already passed.* Chief Justice Fuller, delivering the opinion of the Court, said:[20]

"It *was in the light of well settled principles* that the Act of "July 2nd, 1890 was framed. Congress did not attempt thereby to "assert the power to deal with monopoly directly as such; or to "limit and restrict the rights of corporations created by the States "or the citizens of the States in the acquisition, control, or dispo- "sition of property; * * * or to make criminal the acts of per- "sons in the acquisition and control of property which the States "of their residence or creation santioned or permitted."

Again,[21] he said:

"The subject-matter of the sale was shares of manufacturing "stock, and the relief sought was the surrender of property which "had already passed and the suppression of the alleged monopoly "and manufacture by the restoration of the *status quo* before the "transfers; yet the Act of Congress only authorized the Circuit "Courts to proceed by way of preventing and restraining violations "of the Act in respect of contracts, combinations, or conspiracies "in restraint of interstate or international trade or commerce."

This decision is in exact accord with the decision rendered by the Circuit Court in *In re Greene.*[22] This case, decided in August, 1892, was one of the first cases which arose under the Anti-Trust Act, and involved the Whiskey Trust. Judge Howell E. Jackson, afterwards a justice of the Supreme Court of the United States, held that no criminal offence had been committed in connection with the prosecution of the business of the Whiskey Trust, and his sound and luminous opinion with respect to the meaning of the Anti-Trust Act and the powers of Congress has often been referred to with approval. The whole opinion is well worth careful study. The limits of this article permit only the following short quotation:[23]

"Congress may place restriction and limitations upon the right "of corporations created and organized under its authority to ac- "quire, use, and dispose of property. It may also impose such re-

[20] At p. 16.
[21] At p. 17.
[22] (1892) 52 Fed. 104.
[23] P. 112.

"striction and limitations upon the citizen in respect to the exercise "of a public privilege or franchise conferred by the United States. *"But Congress certainly has not the power or authority under the "Commerce Clause, or any other provision of the Constitution, to "limit and restrict the right of corporations created by the States, "or the citizens of the States, in the acquisition, control, and dis- "position of property.* * * *.

"It is equally clear that Congress has no jurisdiction over, and "cannot make criminal, the aims, purposes and intentions of per- "sons in the acquisition and control of property, which the States "of their residence or creation sanction and permit. It is not "material that such property or the products thereof, may become "the subject of trade or commerce among the several States or with "foreign nations."

The *Knight* case[19] is also in accord with all the other decisions of the United States Supreme Court.[24]

All these cases involved *agreements* and some of them involved, in addition, grossly *illegal acts* of a very oppressive character, done pursuant to the agreements.

The *Freight Association* case[24] and the *Joint Traffic Association* cases[24] involved agreements between railway companies providing for the maintenance of rates, and the *Addyston Steel Company* case[24] involved similar agreements among manufacturing companies. These agreements were held to be both in restraint of trade and "tending to monopoly," and as they directly affected interstate commerce, they came within Section 1, and probably, also, Section 2 of the Anti-Trust Act.

The *Hopkins* and *Anderson* cases[24] involved agreements which in a sense tended to restrain trade, but as these agreements did not *directly* affect interstate commerce, they were held not to be within the scope of the Act. The *Hopkins* case involved the validity of the unincorporated association known as the Kansas City Live Stock Association. The *Anderson* case involved the validity of an unincorporated association known as the Traders' Live Stock Exchange at Kansas City. As the members of the latter Exchange were engaged in interstate commerce, it could not be disputed that to a certain extent the rules of the Association did affect it. The

[24]United States *v.* Trans-Missouri Freight Ass'n (1897) 166 U. S. 290; United States *v.* Joint Traffic Ass'n (1898) 171 U. S. 505; Hopkins *v.* United States (1908) 171 U. S. 578; Anderson *v.* United States (1898) 171 U. S. 604; Addyston Pipe & Steel Co. *v.* United States (1899) 175 U. S. 211; Montague *v.* Lowry (1904) 193 U. S. 38; Swift *v.* United States (1905) 196 U. S. 375; National Cotton Oil Co. *v.* Texas (1905) 197 U. S. 115; Loewe *v.* Lawler (1908) 208 U. S. 274; Shawnee Compress Co. *v.* Anderson (1908) 209 U. S. 423.

court, however, held that it was immaterial, whether the defendants were or were not engaged in interstate commerce, because the agreement among the members of the Association, as evidenced by the by-laws, did not *directly* affect interstate commerce. The court further took notice of the fact that it had been customary for persons engaged in the live stock occupation to associate themselves together. The court should also take notice of the fact that it has been the custom for persons to form partnerships and corporations and to try to make them as large as possible, and therefore, they should not be held as within the Act.

The *Montague, Swift* and *Loewe* cases[24] involved agreements which operated in direct restraint of interstate trade, and, in addition, illegal *acts* of an oppressive nature done pursuant to those agreements. The *Montague* case involved the validity of the agreements and acts of the Tile, Mantel & Grate Association of San Francisco. It was the case of an agreement between manufacturers and dealers, the latter agreeing not to purchase from manufacturers not members of the Association, and not to sell to any one not a member of the Association, except at prices 50% higher than to members, and the manufacturers agreeing not to sell at all to any but members of the Association. This agreement, then, involved the element of duress or coercion such as Judge Taft had in mind, and was to be condemned for much the same reason as similar agreements among union laborers. The *Swift* case[24] (the Beef Trust case), and the *Loewe* case,[24] (the Danbury Hatters case), involved acts flagrantly illegal.

In the *Swift* case, there was an agreement providing that the members should refrain from bidding against each other "except perfunctorily and without good faith;" for bidding up prices for a few days higher than the state of trade would warrant, for the purpose of inducing stock owners in other States to make large shipments; for arbitrarily and from time to time raising and lowering prices; for collusively restricting shipments of meat, and for imposing penalities upon their customers for deviations from certain rules, and for keeping a black list of the customers adjudged delinquent, and for making arrangements with the railway companies for rebates. There could be no question as to the illegality of these acts, or as to the power of the court to restrain them. It is to be noted, however, that the court carefully limited its relief to restraining specific legal acts, and expressly refused to restrain the

exercise of property rights. As originally issued, the injunction contained this limitation:

"Nor shall anything herein contained be construed to restrain "or interfere with the action of *any single company or firm,* by its "or their officers or agents, (whether such officers or agents are "themselves personally made parties hereto or not), acting with "respect to *its or their own corporate or firm business, property or "affairs.*"

In the Supreme Court, the injunction was still further limited, Mr. Justice Holmes striking from it the words, "by any other method or device" and stating:[25]

"So modified it restrains such combinations only to the extent "of certain specified devices, which the defendants are alleged to "have used and intend to continue to use." [26]

The *Loewe* case[24] involved illegal acts of an equally atrocious character, directly affecting interstate commerce. It was a suit for damages under Section 7 of the Act, brought by certain manufacturers of hats, who were conducting their business on the principle of the open shop. The damages which they suffered were caused by a comprehensive conspiracy on the part of the members of the United Hatters of North America and the members of the American Federation of Labor, to compel the plaintiffs to unionize their shop. This conspiracy was pursued by intimidation, coercion, and extensive boycotting of the plaintiffs and their customers; in other words, by methods abhorrent and, to use the words of Senator Sherman, "unlawful by the Code of law of any civilized nation of ancient or modern times."

It has been sometimes supposed that the *Loewe* case indicated a disposition on the part of the Supreme Court to consider the *Knight* case [19] as overruled, but there is really no analogy between the two. The *Knight* case simply involved a union of plant and capital, without more.[27]

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[25]At p. 402.

[26]Compare the cautiously restricted character of this injunction with the sweeping provisions of the injunctive relief asked for by the government in the Standard Oil and Tobacco cases, not to mention the extraordinary demand for the appointment of a receiver to take charge of the entire assets and business of the corporation.

[27]After the decision in the Knight case, in which it was in effect held that under the Anti-Trust Act the Federal Government could not prevent the formation of the large consolidated *industrial* companies, one of the arguments for applying the Act to the merger of *railway* companies was that otherwise there would be little left to which it could be applied. But the decisions in the *Montague, Swift* and *Loewe* cases are a sufficient answer to this argument. And note the absolute impartiality of the law,

The *National Cotton Oil Company* case[24] did not arise under the Anti-Trust Act, but under the laws of Texas, and it was simply held that, under the Anti-Trust Law of Texas, that State had a right to exclude a New Jersey corporation from doing business there.

The *Shawnee Compress Company* case[24] involved an agreement, namely, a lease by one corporation to another, which it was claimed was illegal. It does not appear whether it was claimed to be illegal under the common law, the law of Oklahoma, or the Federal Act. But it was not a suit by the Government or a suit by a person to recover damages under the Federal Act, but an equity suit by stockholders of one company to have the lease canceled. The decision of the Appellate Court of the State was sustained, the Supreme Court stating that the case presented "acts in aid of a scheme of monopoly," citing the *Swift* case.[24] The specific legal act, which it was claimed was in aid of the scheme of monopoly, was enjoined, but there was no intimation or suggestion that the general property rights of either corporation could be disturbed.

In the light of the foregoing principles and authorities, it seems impossible to escape the conclusion that a large corporation, merely as such, does not come within the condemnation of the Anti-Trust Act. The courts may declare illegal an agreement in direct restraint of interstate commerce, and may restrain illegal acts done pursuant thereto. If a large corporation is party to an agreement in restraint of trade, it may be enjoined from performing such agreement. If it is building up its business by rebates, by unfair competitive methods or other unlawful means, violative of the rights of others, it may be enjoined from doing such specific illegal acts; but it cannot be enjoined generally from exercising its rights of property, and thus be practically suppressed, simply because it has

and of the courts of justice in applying it. The *Swift* case involved the unscrupulous conduct of large capitalists, the *Montague* case, the unscrupulous conduct of smaller capitalists, and the *Loewe* case the unscrupulous conduct of Labor.

The real vice of the Anti-Trust Act is that, in its present form, it fosters the very thing which it was designed to check, viz., the tendency to monopoly. This it does by forbidding all agreements in restraint of trade. The *Addystone Steel case* and the *Freight & Traffic Association* cases are largely responsible for the formation of the U. S. Steel Corporation and the Northern Securities Company, respectively. If the first section of the Act should be amended so as to permit all agreements in reasonable restraint of trade, including all agreements for the maintenance of reasonable prices and wages, and the second section should be interpreted or amended so as to make it applicable only to persons and corporations seeking to monopolize by illegal acts, the statute would be a wholesome one, and well adapted to the purposes and objects of this legislation.

or is deemed to have the power of dominating its trade.. A mere union of capital and plant, however large, does not bring it within the terms of the Act, *first,* because the acquisition of its capital and plant was a perfectly lawful act under the State law, and *secondly,* because the acquisition of the capital and plant was not an act or acts directly affecting interstate commerce. Before the Federal Courts, therefore, can grant a restraining order, it must appear that the large corporation itself, after its creation, has done some wrong, either by entering into an agreement in restraint of trade, or by doing some illegal act pursuant thereto. To hold otherwise would be to make the statute revolutionary. But Chief Justice Fuller, who wrote the opinion in the *Knight* case, and also the opinion in the *Loewe* case, held that the Anti-Trust act was passed "in the light of well settled principles." A statute passed "in the light of well settled principles" could not have been intended to be revolutionary.

And, it is respectfully submitted, it would be deplorable if any other conclusion were possible. This must be admitted by every fair-minded man, whatever may be his views on the subject of Trusts. We must not permit our passions and our indignation over evils, some real, some imaginary or largely exaggerated, to tempt us to the violation of the fundamental rights of property. If a new philosophy and a new and imperious public policy demand State ownership of public service corporations, or of land, as Henry George once in effect advocated, the State would not be justified in confiscating the property without due compensation to the owners. Similarly, if a new philosophy and public policy demand the destruction of our large corporations, and the restoration of the smaller enterprises of our ancestors, the State would not be justified in destroying the large corporations, without making due compensation to the persons interested. The builders of our national prosperity, and investors, great and small, had a right to rely upon the *Knight* case and the reassuring words of Mr. Justice Brewer in the *Northern Securities* case. They had a right to rely upon them and upon the security of their investments, as the farmers of Nebraska have a right to rely upon the security of the titles to their land. That this assault upon vested interests should be made by the Federal Government, whose function is impartially to protect the rights of all citizens, is specially deplorable; for it is even more important for the government than for an individual to respect the law and to set an example of righteousness. If the

assault should be successful, there would be another formidable item for President Eliot to add to his catalogue of American lawlessness.

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